

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEVE E. BACQUE

Appeal No. 98-2049
Application 08/549,061¹

ON BRIEF

Before MEISTER, McQUADE and CRAWFORD, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Steve E. Bacque appeals from the final rejection of claims 1 through 11, all of the claims pending in the application. We reverse and remand the application to the

¹ Application for patent filed October 27, 1995.

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examiner for further consideration.

The invention relates to "a lasso toy which is designed to be safely and easily used by children of all ages" (specification, page 1). Claim 1 is illustrative and reads as follows:

1. A lasso toy comprising:

a generally elongate rope;

a handle having an axial bore, said bore being dimensioned to slidably receive said rope;

a swivel provided on a first end of said rope, said swivel cooperating with said handle to permit rotational movement of said handle about said rope while limiting axial movement of said rope relative to said handle; and

means cooperating between a second end of said rope and an intermediate portion of said rope for detachably securing said second end to said intermediate portion of said rope and thereby create a noose, said securing means permitting said second end to release from said intermediate portion under limited predetermined tension in said noose to thereby prevent unsafe use of said toy.

The references of record relied upon by the examiner as evidence of obviousness are:

Schweitzer	3,401,932	Sept. 17, 1968
Muys	4,375,886	Mar. 8, 1983
Sauerbrey	5,005,828	Apr. 9, 1991

Additional references of record discussed below are:

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Daniels	2,044,240	Jun. 16, 1936
Hoody	2,592,696	Apr. 15, 1952

Items relied upon by the appellant as evidence of non-obviousness are:

The 37 CFR § 1.132 Declarations of Steve E. Bacque and A. Kevin Alexander filed on June 10, 1996 as part of Paper No. 4.

Claims 1 through 5, 7 and 8 stand rejected under 35 U.S.C. § 103 as being unpatentable over Schweitzer in view of Muys, and claims 6 and 9 through 11 stand rejected under 35 U.S.C. § 103 as being unpatentable over Schweitzer in view of Muys and Sauerbrey.

Reference is made to the appellant's brief (Paper No. 9) and to the examiner's answer (Paper No. 10) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.

Schweitzer, the examiner's primary reference, discloses plural embodiments of a spinning lariat or lasso. In the embodiment shown in Figure 1,

a hand hold 10 is connected by means of a swivel 11 to a fixed loop 12 formed in one end of a rope body

13. The loop 12 defines one end of a spindle portion 14 of the rope body 13 which is a continuous section of rope. The other end of the spindle 14 is defined by a repositionable adjustable keeper 15 which also defines a spinning loop 16 at the point 13a where it attaches to the second end position of the rope body 13. The details of the keeper 15 are shown more fully in co-pending application Ser. No. 264,186,^[2] but it generally is a two-piece member having opposed curved rope retaining portions connected by a flange with screw fastening means through the flange portions, holding the fastening means together, and when tightened, it exerts pressure on the rope to hold the rope in a fixed relation. The free end 17 of the rope 13 is held by a keeper 15a against the section of rope body 13 directly aligned with spindle 14 [column 1, line 68, through column 2, line 14).

The principle issue with regard to the rejection of claims 1 through 5, 7 and 8 is whether Schweitzer teaches, or would have suggested, a lasso toy meeting the recitation in independent claim 1 of means cooperating between the second end and intermediate portion of the rope for detachably securing same to create a noose wherein the securing means permits the second end to release from the intermediate portion under limited predetermined tension in the noose to thereby prevent unsafe use of the toy. The appellant's

² This application matured into U.S. Patent No. 3,249,356, which is of record in the instant application.

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argument that Schweitzer falls short in this regard (see pages 4 and 5 in the brief) is persuasive.

More particularly, the examiner's determination that Schweitzer's keepers 15, 15a constitute a securing means having the properties called for in claim 1 (see pages 5 and 6 in the answer) finds no factual support in the disclosure of the Schweitzer reference (or in the disclosure of Application 264,186, now U.S. Patent No. 3,249,356, mentioned therein), and

rests on a characterization of Schweitzer's keepers which is completely unreasonable. Since Muys' disclosure of a jump rope having a handle-swivel construction of the sort recited in the appealed claims does not overcome this deficiency in Schweitzer, we are constrained to conclude that this reference combination fails to establish a prima facie case of obviousness with respect to the subject matter recited in claim 1 and in claims 2 through 5, 7 and 8 which depend therefrom.

Dependent claims 6 and 9 further define the securing means recited in parent claim 1 as being hook and loop

securing material. Independent claim 10 is generally similar in scope to claim 1, but requires, instead of the securing means set forth in claim 1, hook and loop fastening material cooperable between the second end and intermediate portion of the rope to form the rope into a noose, with the material being dimensioned and configured to permit release of the second end from the intermediate portion upon predetermined limited tension of the noose to thereby prevent unsafe use of the toy. The examiner's reliance on Sauerbrey in combination with Schweitzer and Muys to meet the hook and loop limitations in claims 6, 9 and 10 is not well founded.

Sauerbrey discloses a high jump assembly 10 consisting of upright standards 12, 14, brackets 18, 20 adjustably mounted on the standards, and a ribbon releasably connected at each end to the brackets via hook and loop fasteners designed to disengage when subjected to a predetermined tear force (see, for example, column 6, lines 56 through 59) to prevent injury to a jumper.

Even if Sauerbrey is assumed for the sake of argument to be analogous art (the appellant submits that it is not), there

is nothing in Sauerbrey's use of hook and loop material to releasably position a high jump ribbon which would have suggested the use of such material in place of Schweitzer's lasso keepers. The examiner's reasoning to the contrary (see page 4 in the answer) clearly is predicated on speculation, unfounded assumptions and hindsight reconstruction. Thus, here again we are constrained to conclude that the reference combination relied upon by the examiner fails to establish a prima facie case of obviousness with respect to the subject matter recited in claims 6, 9 and 10, and in claim 11 which depends from claim 10.

In light of the foregoing, we shall not sustain the standing 35 U.S.C. § 103 rejections of claims 1 through 11.³

³ Since the references applied by the examiner fail to establish a prima facie case of obviousness with respect to the subject matter recited in claims 1 through 11, we find no need to consider in any detail the appellant's rebuttal evidence of non-obviousness. We would note in passing, however, that the showings of commercial success in the

Finally, the application is remanded to the examiner to consider whether the subject matter recited in claim 1 or any other claim would have been obvious within the meaning of 35 U.S.C. § 103 in view of the combined teachings of Hoody and Daniels, with or without additional prior art references. In this regard, Hoody discloses a lariat or lasso toy which is made safe for children by the inclusion of an element 14 for detachably securing end and intermediate portions of the lariat rope to create a noose wherein the element permits the end portion to release from the intermediate portion under limited predetermined tension in the noose. Daniels discloses a spinning rope or lasso having a handle-swivel construction of the type required by the claims to facilitate spinning the rope.

In summary:

a) the decision of the examiner to reject claims 1

declarations proffered by the appellant are rather ambiguous and speculative, and have not been placed in any meaningful context (see, for example, In re Huang, 100 F.3d 135, 137, 40 USPQ2d 1685, 1689 (Fed. Cir. 1996); Cable Elec. Prods. Inc. v. Genmark, Inc., 770 F.2d 1015, 1026-27, 226 USPQ 881, 887-88 (Fed. Cir. 1985)).

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through 11 under 35 U.S.C. § 103 is reversed; and

b) the application is remanded to the examiner for
further consideration.

REVERSED AND REMANDED

JAMES M. MEISTER)	
Administrative Patent Judge)	
)	
)	
)	
JOHN P. McQUADE)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
MURRIEL E. CRAWFORD)	
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